

Shape

Description automatically generated

# **Complementary submission on the status of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand**

## **To the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**

November 2023

1. **Introduction**

Te Kāhui Tika Tangata o Aotearoa | New Zealand Human Rights Commission (the Commission) is established and operates under the Crown Entities Act 2004 and the Human Rights Act 1993 (HRA).[[1]](#footnote-2) Te Kāhui Tika Tangata is accredited as an ‘A status’ national human rights institution under the Paris Principles.

The Commission’s functions under the HRA include:

1. to be an advocate for human rights and promote and protect, by education and publicity, respect for, and observance of, human rights;[[2]](#footnote-3) and
2. to promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law.[[3]](#footnote-4)

It is in line with these functions that the Commission provides this submission as a brief aid for the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in discussions at its expert seminar from 6-8 November 2023, and more generally in developing its thematic study on:

Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration.

The Commission is of the view that this submission might be of assistance to the EMRIP in understanding the political, legal, and constitutional status of the Declaration in New Zealand. We may also provide further submissions in response to the call for input issued by the EMRIP to assist in the development of this study.

In this submission, the Commission:

* provides a brief background on New Zealand’s relationship with the Declaration;
* describes some of the synergies between the Declaration and Te Tiriti o Waitangi (the treaty signed in 1840 between Māori and the Crown)
* outlines instances where the Declaration has been recognised judicially, including by the Waitangi Tribunal;
* highlights progress on the National Action Plan to implement the Declaration in New Zealand; and
* provides some overall comments on the implications of the Declaration’s status in New Zealand and measures needed to advance and protect the realisation of Māori rights.

1. **Aotearoa New Zealand and the Declaration**

New Zealand was among the four member states that rejected the adoption of the Declaration by the General Assembly in 2007.[[4]](#footnote-5)

New Zealand eventually expressed its support for the Declaration in 2010, stating that it “both affirms those [Declaration] rights and reaffirms the legal and constitutional frameworks that underpin New Zealand’s legal system”, and that “those existing frameworks, while they will continue to evolve in accordance with New Zealand’s domestic circumstances, define the bounds of New Zealand’s engagement with the aspirational elements of the Declaration.”[[5]](#footnote-6)

The Commission is of the view that there is an inherent tension in the fact that, while the New Zealand recognises the rights in the Declaration to an extent, it views many of these as merely aspirational and continues to be resistant to the idea that changes may be required to New Zealand’s laws and constitutional frameworks in order to bring these into line with the Declaration.

Accordingly, there is no recognition of the Declaration, and therefore positive obligation for its implementation, in New Zealand legislation or its constitutional arrangements.

1. **Synergies between the Declaration and Te Tiriti**

Te Tiriti o Waitangi is now recognised as part of New Zealand’s constitutional arrangements through judicial, executive, and legislative recognition.

The courts have recognised Te Tiriti as of “the greatest constitutional importance to New Zealand”.[[6]](#footnote-7) Te Tiriti has been incorporated into statute law, including through the Supreme Court Act 2003, which has as one of its purposes to establish the Supreme Court as our apex court “to enable … legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions”;[[7]](#footnote-8) the Treaty of Waitangi Act 1975 which appends te Tiriti as the First Schedule; and by enacting “Treaty principles” provisions in numerous statutes. Executive recognition has included the Cabinet Manual’s express acknowledgement that te Tiriti is “an integral part of New Zealand’s constitutional framework”,[[8]](#footnote-9) and notes that “the Treaty’s status will continue to evolve along with other constitutional principles and norms”.[[9]](#footnote-10) It also includes the Cabinet Office Circular CO 19(5), which states that Te Tiriti is “one of the major sources of New Zealand’s constitution”; identifies guidelines for policymaker to consider Te Tiriti in policy development and implementation;[[10]](#footnote-11) and notes that “[w]hile the courts and previous guidance have developed and focussed on principles of the Treaty, this guidance takes the text of the Treaty as its focus”.[[11]](#footnote-12)

Indigenous peoples’ rights in the Declaration have several synergies with Māori rights found in Te Tiriti. This was highlighted in New Zealand’s support for the Declaration, where Hon Pita Sharples stated, “[t]he Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect.”[[12]](#footnote-13) Equally, Indigenous Human Rights Commissioner Karen Johansen stated in 2010 that “[m]any of the articles in the Declaration intersect with the principles of the Treaty of Waitangi. There is considerable scope for the Declaration to be used to support, clarify and promote understanding of the Treaty”.[[13]](#footnote-14)

The following table sets out some of the provisions and core themes of the Declaration that most directly compliment the articles and principles of Te Tiriti:

|  |  |
| --- | --- |
| **Te Tiriti o Waitangi** | **UN Declaration on the Rights of Indigenous Peoples** |
| **Article 2** – the Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.  Principle of **tino rangatiratanga** (Māori sovereign authority; self-determination) | Articles 3, 4, 5, 33, 34, and 35  Theme – **Rights to self-determination** |
| **Article 3** – the Queen of England will protect all the ordinary people [Māori] of New Zealand and will give them the same rights and duties of citizenship as the people of England.  Principle of **equity and equality** | Articles 2, 5, 18, 20, and 39  Theme – **Rights to freedom from discrimination** |
| **Article 1** – the Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.  Principle of **good governance** | Articles 19, 38, 39, and 46 |
| **Article 1** – See above.  Principle of **partnership** | Articles 5, 18, 19 and 32  Themes – **Free, prior and informed consent; and rights to participate in decision-making.** |
| **Article 2** – See above.  Rights to **culture and property** | (**Rights to culture**) Articles 8, 9, 11, 12, 13, 14, 15, 31, and 34  (**Rights to lands, territories, and resources**) Articles 25, 26, 27, 28, 29, 30, and 32 |
| **Article 3** – See above.  Rights of **citizenship** | Article 5 and 33  Theme – **Civil and political rights** |

The Declaration’s emphasis on positive action is important because it recognises that historic injustices resulting from colonisation and dispossession may already have negatively impacted indigenous peoples’ ability to enjoy the full measure of their rights. A purely negative conception of rights and freedoms assumes an adequate and equal baseline of enjoyment of rights in respect of all people. That is of course not the case in respect of Māori, who suffered manifest denials of their culture as a result of the government policies carried out in the second half of the 19th and well into the 20th century.

The sections below offer examples of official recognition of the relationship between te Tiriti and the Declaration by the New Zealand courts and Waitangi Tribunal.

1. **Judicial recognition of the Declaration**

New Zealand’s courts, including the Supreme Court, have drawn on the Declaration in their interpretation of Te Tiriti, and in support of Māori rights in a range of areas.

The Supreme Court in NZMC (freshwater) stated, “that the Declaration provides some support for the view that [Te Tiriti] principles should be construed broadly”,[[14]](#footnote-15) an important point if this statement is to be read as requiring a Declaration-consistent interpretation of Tiriti principles more generally.

More recently in *Ellis*, the Supreme Court concluded that the current place of tikanga (Māori customary law), as a part of the fabric of New Zealand’s law through legislative and common law recognition, is a manifestation of article two of Te Tiriti and highlights New Zealand’s commitment to the Declaration,[[15]](#footnote-16) citing a provision on Indigenous peoples rights to maintain and develop their institutions, customs, traditions, and juridical systems.[[16]](#footnote-17) The statements provide a judicial indication that consistency with Te Tiriti and the Declaration requires a firm recognition and protection of tikanga Māori in New Zealand’s legal landscape, and that analogies might be made between the Declaration’s recognition of Indigenous peoples rights to their institutions and legal systems, and the Tiriti guarantee of Māori rights to tino rangatiratanga.

While not always explicitly drawing on analogies with Te Tiriti or human rights, key cases which have referenced the Declaration include: *Ngāti Whātua Ōrākei Trust v Attorney-General* *(Ngāti Whātua Ōrākei);[[17]](#footnote-18) Proprietors of Wakatū & Rore Stafford v Attorney-General (Wakatū); [[18]](#footnote-19) Takamore;[[19]](#footnote-20) Paki No 2;[[20]](#footnote-21)* and the abovementioned *NZMC v Attorney-General (freshwater); [[21]](#footnote-22)* In *Ngāti Whātua Ōrākei*, the Chief Justice, albiet in the minority, required the lower courts to assess an argument for judicial review of a decision against Ngāti Whātua on the basis of the Declaration, amongst a number of other standards. In *Wakatū*, the minority took the Declaration into account as one of the relevant factors to determine standing of a wide range of Māori representative structures. In *Takamore,* the Supreme Court cited the Declaration in support arguments made by a whānau Māori to determine where to bury their son/sibling. In *Paki No 2,* Supreme Court Chief Justice Elias referred, when making obiter comments on potential duties in equity owed by the Crown to Māori, to the Declaration’s provisions with respect to redress for lands, territories and resources taken from Indigenous peoples without their free, prior and informed consent.

While the courts’ consideration and referencing of the Declaration in these cases is significant, the Declaration was, however, not singularly decisive in any of these cases.

1. **Waitangi Tribunal recognition of the Declaration**

The Waitangi Tribunal is a standing commission of inquiry that makes recommendations on claims brought by Māori relating to legislation, policies, actions or omissions of the Crown that are alleged to breach Te Tiriti o Waitangi (Te Tiriti).[[22]](#footnote-23) In fulfilling this role, the Tribunal has exclusive authority to interpret and determine the meaning and effect of the principles of Te Tiriti.[[23]](#footnote-24)

The Waitangi Tribunal addressed the relationship between the Declaration and Te Tiriti in its WAI 2417 inquiry.[[24]](#footnote-25) WAI 2417 raised the question of Māori right to self-determine the structure, nature and development of Māori institutions, in this case the New Zealand Māori Council (NZMC), which had been legislatively established under the Māori Community Development Act 1962.

In its final report on WAI 2417, the Tribunal devoted a whole preliminary chapter to “The Treaty and the Declaration on the Rights of Indigenous Peoples”. It includes a reinforcement of the Declaration’s “significant normative weight”,[[25]](#footnote-26) and justifications for interpreting Tiriti principles consistently with the Declaration, stating that “UNDRIP is therefore relevant to the manner in which the principles of the Treaty of Waitangi should be observed by Crown official. This is particularly the case where the UNDRIP articles provide specific guidance as to how the Crown should be interacting with Māori or recognising their interests.”[[26]](#footnote-27) The chapter also outlines consistencies between the Declaration and relevant Tiriti principles including kāwanatanga (good Crown governance), rangatiratanga (Māori sovereign authority; self-determination) and partnership.

The Declaration was referred to by Waitangi Tribunal Presiding Officer, Deputy Chief Judge Caren Fox, and Emeritus Professor Tamati Reedy in its WAI 2200 inquiry.[[27]](#footnote-28) The subject of this inquiry was various treaty claims lodged by tribes within the Porirua ki Manawatū district concerning the loss of their land; economic disadvantage; education policies and their effect on the Māori language; and environmental issues resulting from Crown actions.[[28]](#footnote-29) In a December 2010 Memorandum of Directions (No.7), Deputy Chief Judge Fox stated that the Declaration declares “base standards of Indigenous rights for all States who have affirmed it” and that “as the courts and tribunals of this country are part of the state of New Zealand”, then “to the extent that rights declared in the UNDRIP may be recognised consistent with the jurisdiction and procedures of the Tribunal, then this Tribunal should do so.”[[29]](#footnote-30) She also was of the view that it was consistent with relevant legislation for the Tribunal to adopt a process “that gives due recognition to the relevant articles of the UNDRIP whilst performing its functions in accordance with the law of New Zealand.”[[30]](#footnote-31)

The Waitangi Tribunal, in its WAI 262 report on Indigenous Flora and Fauna and Cultural Intellectual Property (2011),[[31]](#footnote-32) described the Declaration as “a landmark international acknowledgement that Indigenous collectives as well as individuals have rights to self-determination and in respect of their culture, identity, language, employment, health, education, and other matter”.[[32]](#footnote-33) It also considered the Declaration as carrying a moral and political force that is expected to form the basis of customary international law on Indigenous peoples rights.[[33]](#footnote-34)

There are many other references to the Declaration by the Waitangi Tribunal, including in the following reports:

1. The Taranaki Report;[[34]](#footnote-35)
2. The Report on the Management of Petroleum Resource;[[35]](#footnote-36)
3. The Stage 1 Report on the National Freshwater and Geothermal Resources Claim.[[36]](#footnote-37)
4. **National Action Plan on the Declaration**

In March 2019, Cabinet approved a process to develop a national action plan to implement the Declaration in New Zealand.[[37]](#footnote-38) This commitment followed numerous recomendations made during the 3rd Cycle of the Human Rights Council’s Universal Periodic Review of New Zealand which urged New Zealand to implement the Declaration and Te Tiriti through a national action plan, and/or by ensuring that law, policy and practice conform with these obligations.[[38]](#footnote-39)

Between 2021 and 2022, representatives from Pou Tikanga of the National Iwi Chairs Forum, alongside representatives from the Human Rights Commission and Ministry for Māori Development worked in partnership to develop a national action plan to implement the Declaration. The process drew on the Advice provided by the Expert Mechanism following its country visit to New Zealand in 2019.[[39]](#footnote-40) The process was commendable for the equal governance authority of both Māori and the Crown.

The plan was based on feedback received from engagement with Māori[[40]](#footnote-41) which stressed the need to strengthen Māori self-determination and tino rangatiratanga (sovereign authority), including in relation to health, justice, housing, and the environment; to ensure greater Māori participation in decision-making; to address racism and discrimination; and to improve understanding of Te Tiriti and Indigenous peoples’ rights.

The targeted engagement was intended to be the first of two engagement phases. A draft action plan was intended to be released for broad public engagement, before being finalised by February 2023.

Ultimately, the Government unilaterally decided to pause the process rather than agree a draft for public consultation.[[41]](#footnote-42) Reasons included timing, the need for greater public awareness and acceptance of the Declaration, and because of the significant legislative and policy reform required to meet the Declaration’s standards. It was a political decision given the growing unpopularity of recognition of Māori rights in the build up to the election.

1. **Overall comments**

The Commission agrees with the Government that the Declaration requires more socialisation nationally. However, we are of the view that New Zealand’s human rights obligations require it to act now to realise Indigenous peoples’ rights under the Declaration.

Despite being cited positively by New Zealand courts and the Waitangi Tribunal, and the active duties (including legislative measures) on the State to achieve the ends of the Declaration arising out of article 38, there is no explicit acknowledgement or protection for the Declaration provided in New Zealand legislation or its constitutional arrangements. Accordingly, there is no positive domestic legal obligation for the implementation of the Declaration and it remains difficult to enforce without incorporation in law.

New Zealand’s formal commitment to the Declaration remains political. As a result, measures taken to progress Māori rights under the Declaration and Te Tiriti are consistently vulnerable to politicisation, rejection, and regression, as was highlighted with the stalling of the National Action Plan.

To advert the longstanding political fragility of Māori rights in New Zealand and create a positive legal obligation on the State to realise these rights as set out in the Declaration; in line with article 38, the Commission is of the firm view that New Zealand must make a strong legal and constitutional commitment to achieve the ends of the Declaration. This should form the basis for the continued development of a National Action Plan, and undertaking the policy, statutory, and constitutional reforms necessary for New Zealand to meet its standards. The Commission also recognises that this must be accompanied by a comprehensive effort to socialise the Declaration, Te Tiriti o Waitangi, Māori rights, and the collective benefits of their realisation with the New Zealand public.

1. Human Rights Act 1993. [↑](#footnote-ref-2)
2. Ibid, s 2(a). [↑](#footnote-ref-3)
3. Ibid, s 2(d). [↑](#footnote-ref-4)
4. <https://press.un.org/en/2007/ga10612.doc.htm> [↑](#footnote-ref-5)
5. New Zealand Government [“Supporting UN Declaration restores NZ’s mana”](https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nzs-mana) (press release, 20 April 2010). [↑](#footnote-ref-6)
6. *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* at [150] per William young and Ellen France JJ. See also at [237] per Glazebrook J, [296] per Williams J, and [332] per Winkelmann CJ. [↑](#footnote-ref-7)
7. Supreme Court Act 2003, s 3(1)(a)(ii). While this purpose was on stated in respect of the Supreme Court, it goes without saying that courts further down the hierarchy would be expected to do the same. The Treaty is also relevant to the Court’s leave criteria, Supreme Court Act 2003, s 13(2)(a) and (3). See also Senior Courts Act 2016, s 66(1) and, for the leave criteria, s 74(2)(a) and (3). [↑](#footnote-ref-8)
8. Department of Prime Minister and Cabinet, Cabinet Manual 2023, at 2 and Appendix A (accessible at <https://www.dpmc.govt.nz/sites/default/files/2023-06/cabinet-manual-2023-v2.pdf>). [↑](#footnote-ref-9)
9. Ibid at 155. [↑](#footnote-ref-10)
10. Cabinet Office Circular, CO19(5), 22 October 2019, at [2] (accessible at <https://www.dpmc.govt.nz/sites/default/files/2019-10/CO%2019%20%285%29%20Treaty%20of%20Waitangi%20Guidance%20for%20Agencies.pdf>) [↑](#footnote-ref-11)
11. Ibid at [17]. [↑](#footnote-ref-12)
12. Rt Hon Pita Sharples “The Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect.” New York, 19 April 2010 and in New Zealand Māori Council v Attorney-General [2013] 3 NZLR 31 (SC). [↑](#footnote-ref-13)
13. Commissioner Karen Johansen’s address to the UN Expert Mechanism on the Rights of Indigenous Peoples, Third Session, July 2010. [↑](#footnote-ref-14)
14. *NZMC v Attorney General* (*NZMC freshwater)* [2013] NZSC 6 at [92]. [↑](#footnote-ref-15)
15. *Ellis v R* [2022) NZSC 114 at [126]. [↑](#footnote-ref-16)
16. UNDRIP, art 34. [↑](#footnote-ref-17)
17. *Ngati Whatua Orakei Trust v Attorney General* [2018] NZSC 84*.* [↑](#footnote-ref-18)
18. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17*.* [↑](#footnote-ref-19)
19. *Takamore v Clarke* [2012] NZSC 116*.* [↑](#footnote-ref-20)
20. *Paki v Attorney-General (No 2*) [2014] NZSC 118*.* [↑](#footnote-ref-21)
21. *NZMC v Attorney General* (*NZMC freshwater)* [2013] NZSC 6. [↑](#footnote-ref-22)
22. Waitangi Tribunal “About the Waitangi Tribunal” (4 September 2023) Waitangi Tribunal <https://www.waitangitribunal.govt.nz/about/> [↑](#footnote-ref-23)
23. Ibid. [↑](#footnote-ref-24)
24. Waitangi Tribunal [*Report on the Māori Community Development Act*](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_85007148/Maori%20Council%20ReportW.pdf)(Wai 2417, 2014). [↑](#footnote-ref-25)
25. Ibid at 34. [↑](#footnote-ref-26)
26. Ibid at 39. [↑](#footnote-ref-27)
27. Waitangi Tribunal “Inquiries: Porirua ki Manawatū” <https://waitangitribunal.govt.nz/inquiries/district-inquiries/porirua-ki-manawatu/>. [↑](#footnote-ref-28)
28. Ibid. [↑](#footnote-ref-29)
29. Para 55. [↑](#footnote-ref-30)
30. Para 56. [↑](#footnote-ref-31)
31. Waitangi Tribunal [*Ko Aotearoa Tēnei*](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356054/KoAotearoaTeneiTT1W.pdf)(Wai 262, 2011). [↑](#footnote-ref-32)
32. Ibid at 672. [↑](#footnote-ref-33)
33. Ibid at 233. [↑](#footnote-ref-34)
34. Wai 143 (Wellington, 1996) at 307-308. [↑](#footnote-ref-35)
35. Wai 796 (Wellington, 2010) 144 and 152-153. [↑](#footnote-ref-36)
36. Wai 2359 (Wellington, 2012) at 33, 35, 98, 140 and 235. [↑](#footnote-ref-37)
37. Cabinet Minute of Descison “New Zealand’s Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of a National Plan” (March 2019) CAB MCR-19-MIN-0003 at [4]. See also <https://www.tpk.govt.nz/en/mo-te-puni-kokiri/corporate-documents/cabinet-papers/all-cabinet-papers/next-steps-for-declaration-plan>. [↑](#footnote-ref-38)
38. For example: recommendations 122.167-172, A/HRC/41/4/Add.1 - Para. 56-63. [↑](#footnote-ref-39)
39. EMRIP (2019), *Expert Mechanism on the Rights of Indigenous Peoples Country Engagement Mission (8 – 13 April 2019) – New Zealand, 14 July 2019*, accessible at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/EMRIPAdvisroyNoteNZ2019.docx> [↑](#footnote-ref-40)
40. The report of targeted engagement is available at: <https://www.tpk.govt.nz/docs/tpk-undrip-keythemesm%C4%81oritargetedengagement-april2022v2.pdf> [↑](#footnote-ref-41)
41. <https://www.newsroom.co.nz/co-governance-plan-kicked-down-the-road-to-2024> [↑](#footnote-ref-42)